IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 322

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, a National Banking Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

ROSCOE HERGET, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois Corporation, Bankrupt,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, a National Banking Corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Roscoe Herget, Trustee in Bankruptcy of N. L. Rogers & Company, Inc., an Illinois corporation, Bankrupt, prays that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Southern District of Illinois, Northern Division.

Opinions Below.

The opinion of the United States District Court for the Southern District of Illinois (R. 9) is reported in 53 F. Supp. 265. The opinion of the Circuit Court of Appeals (R. 20-23) is reported in 141 F. 2d 150.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered February 5, 1944 (R.). Petition for rehearing seasonably filed by petitioner (R. 25) was denied on April 5, 1944 (R. 31). By order of Mr. Justice Murphy entered June 10, 1944, time within which to file petition for certiorari was extended to August 5, 1944 (R. 34). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether an action to recover a preference under section 60b of the Bankruptcy Act is by the limitation prescribed by section 11e of the same Act, added by the Chandler Act of June 22, 1938, barred at the end of two years from the date of adjudication or is, as petitioner contends and as is specifically provided in section 11e, barred only at the end of the longer period provided by state law—in this case five years.

2. Whether the five year period of limitation prescribed by Ill. Rev. Stats. (State Bar ed.) c. 83, secs. 12 and 15, constitutes the period of time permitted by State law and adopted by section 11e of the Bankruptcy Act as the limitation for the bringing of actions based on rights created by the Bankruptcy Act such as the trustee's right to recover a voidable preference under Section 60b.

Statutes Involved.

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further

period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *

The Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.*

Statement.

The complaint alleged, and the defendant's motion to dismiss (R. 7) admits the pertinent facts:

On April 11, 1938, N. L. Rogers & Company, Inc., an Illinois corporation, was adjudged a bankrupt in the District Court of the United States for the Southern District of Illinois, Southern Division (R. 2). Petitioner was elected trustee on May 25, 1938 and immediately thereafter qualified as such trustee (R. 2).

On March 3, 1942, the petitioner, Roscoe Herget, as Trustee in Bankruptcy of the Rogers Company, filed his complaint under Section 60 of the Bankruptcy Act in the same court against the respondent, The Central National Bank & Trust Company of Peoria, a National Banking Corporation, to recover preferences amounting to $308,122.58 alleged to have been given by the bankrupt to the respondent at a time when the bankrupt was insolvent and the defendant had reasonable cause to believe the bankrupt to be insolvent, all within four months prior to the filing of the petition in bankruptcy, April 11, 1938 (R. 2-4).

The defendant (respondent herein) moved to dismiss the complaint on the ground that because the suit had been instituted at a date more than two years subsequent to the date of the adjudication in bankruptcy, it was barred by the provisions of section 11e of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938, 52 Stat. 849, (R. 7-8).

The district court held that the cause of action accrued with the appointment and qualification of the trustee, and because it arose under the Bankruptcy Act, it was barred by section 11e upon the expiration of two years from the date of appointment of the trustee and entered its order accordingly (R. 9-11).

On February 5, 1944, the Circuit Court of Appeals filed its opinion holding petitioner's cause of action barred by the two-year clause of section 11e and not within the operation of the alternative clause of the same subsection: "or within such further period of time as the * * * State law may permit," so as to make applicable the five-year period permitted by the State law, Rev. Stats. (State Bar ed.) c. 83, secs. 12, 15, p. 2012 (R. 20-23). Judgment of affirmance was entered the same day (R. 23). Petition for rehearing was denied April 5, 1944 (R. 31).

Specifications of Error to Be Urged.

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that under subsection 11e of the Bankruptcy Act, action to recover preferences is barred unless brought within two years subsequent to the date of adjudication.

2. In failing to hold that under subsection 11e of the Bankruptcy Act the period of limitations on actions to recover preferences in the Federal courts for Illinois is the five-year period provided by section 15 of the Illinois Revised Statutes and adopted by reference by subsection 11e.

3. In holding that the clause of the first sentence of subsection 11e permitting institution of proceedings on any claim "within such further period of time as the Federal or State law may permit" is inapplicable to actions to recover preferences.

4. In interpolating the language "permitting or creating the cause" in the second alternative clause of the first sentence of section 11e so as to make it read "within such further period of time as the Federal or State law [permitting or creating the cause] may permit."

5. In holding that "since it is the Bankruptcy Act which creates the cause, it must provide the period for bringing it."

6. In holding that "there is no applicable state statute for the reason that the cause of action was not created by the State."

7. In failing to hold that the alternative clause of the first sentence of subsection 11e applies, according to its terms, to all proceedings by the trustee in behalf of the

estate upon any claim regardless of the law creating such claim.

8. In holding that the clause of section 11e expressly adopting the limitation fixed by State or Federal law does not extend to causes of action created by the Bankruptcy Act.

Reasons for Granting the Writ.

The facts alleged in the complaint are admitted by the motion to dismiss. The cause of action arose on April 11, 1938, the date of adjudication (R. 27). Suit was filed by the trustee March 3, 1943, more than two, but less than five, years subsequent to that date (R. 2).

The trustee relies on the provisions of Section 11e of the Bankruptcy Act as amended (11 U. S. C. sec. 29e):

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

And the trustee further relies on sections 12 and 15 of the Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed.) c. 83, secs. 12 and 15):

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.
>
> Sec. 15. Action on unwritten contracts * * * and, all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

Because section 11e provides that the trustee may institute proceedings in behalf of the estate upon "any claim"

within two years subsequent to the date of adjudication *or within such further period of time as the* * * * *State law may permit*, the trustee contends that suit brought within the five-year period, fixed by the Illinois law, and by section 11e adopted by reference, is within time.

The Circuit Court of Appeals by *obiter* attempted to becloud the plain meaning of the state statute.[1] But, the court placed the ground of its affirmance squarely on a purported paraphrase of the language involving a violent interpolation of language so as to narrow the ambit of the clause "within such further period of time as the Federal or State law may permit" and make the period established by state law operative only where such further period is "provided by the statute permitting or creating the cause" (R. 22). A fundamental error also appears in the court's holding (R. 22): "since it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it * * *."

1. **The decision of the court below is in disregard of, and violates the plain language of the Statute.** The language of section 11e is clear and effect may be given to all its parts without necessity for construction or interpolation such as that in which the court below engaged. When the meaning of a statute is plain, there is no room for interpretation. *Lake County* v. *Rollins*, 130 U. S. 62; *Lewis* v. *United States*, 92 U. S. 618, 5[illegible] Section 11e obviously authorizes suit by the receiver or trustee within two years subsequent to date of adjudication *or* within the period of

[1] Even if "statute" as used in Section 12 of the Illinois law be deemed to include Federal statutes, it still is clear that "a different limitation is [not] prescribed by statute" because the Federal statute expressly prescribes two years "or within such further period of time as the Federal or State law may permit." The limitation, if any, in section 11e must necessarily be the maximum period and it therefore prescribes a period identical with, and not "different" from, that prescribed by section 15 of the State law.

time permitted by other federal or state law, whichever is longer, with the proviso that no claim already barred at the date of the petition shall be revived.[2] The time provision in the first sentence of section 11e is unitary although stated in the alternative: the two alternative clauses are unseparated even by a comma and obviously fix a single mode of measurement to be applied to "any claim." As was stated by this Court in *United States* v. *Goldenberg*, 168 U. S. 95, 102-103:

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent.

No reason for departure from the general rule was suggested by the court below. Taken in their ordinary and received import and according to accepted rules of grammar and punctuation the words of subsection 11e require reference to the state statute of limitations to ascertain the time there permitted for the bringing of such a suit. If longer than two years, the trustee is to have the benefit of it.

The Illinois state law permits suit on this claim at any time within five years after the cause of action accrues. —Illinois Rev. Stats. (State Bar ed.), c. 83, provide:

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[2] The concluding and modifying clause, "against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition" obviously has only the same effect as though it were in specific proviso form such as was used in the Bankruptcy Act of 1867, sec. 2 (14 Stat. 518):

> *Provided*, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute*: * * *
>
> Sec. 15. Actions on unwritten contracts, express or implied * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

Respondent in the court below argued that within the meaning of the italicized clauses, section 11e prescribed a different limitation and this action is "otherwise provided for."

The respondent's theory leads only into a sort of statutory and endless renvoi which can be resolved only by resolving the main question—the meaning of section 11e. For respondent asserts that the initial reference in section 11e to the state statute brings up against the provision in section 12 of the state law: "except when a different limitation is prescribed by statute." Respondent takes this as a re-reference to section 11e of the Bankruptcy Act and on the re-reference selects the two-years clause as constituting a "different limitation" "prescribed by statute," this time entirely ignoring the clause which refers to the state law. The respondent's theory thus involves a circular reasoning which cannot be accepted because of its absurdity. For there is no more reason on the re-reference for thus ignoring and nullifying the part of section 11e which adopts the further period permitted under state law than for so doing on the initial consideration of section 11e. Cf. 1 Beale, Conflict of Laws, sec. 7.3, pp. 56-57.

When section 11e provides for "such further period of time as the * * * State law may permit" it is difficult to comprehend how it may be regarded as providing "a different limitation" or as making the action one "otherwise provided for" within the meaning of those clauses as used in the sections of the Illinois statutes above quoted.

It is therefore submitted that the meaning of section 11e is plain without necessity for construction and under it chapter 83, section 15 of the Illinois Revised Statutes authorizes suit in this case within five years from the date the cause of action arose.

2. **The interpretation by the court below involves judicial legislation.**—One of the reasons for the enactment of Section 11e as a part of the Chandler Act was the elimination of the confusion which had arisen in the application of Section 11d of the Bankruptcy Act of 1898, 30 Stat. 549, which provided:

> Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

As early as September 1931, the committee on legislation of the National Association of Referees in Bankruptcy recommended a number of changes in the Act. In recommending amendment of subsection 11d, approximately the first sentence of subsection 11e as finally enacted, that committee said (6 J. N. A. Referees Bank. 61, 65):

> Decisions under this section are in hopeless confusion. Question arises why should the trustee bring a suit after the estate has been closed when he is *functus officio*. Question also arises whether this means two years after the case has been reopened and closed. There is some doubt in some of the cases as to whether the state law limitation controls in some instances, or whether this is an exclusive limitation.[3] As amended it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the statute of limitations within that period. In other words, if the statute has not run at the time *the petition* in bankruptcy is filed, the trustee has two

[3] Cf. *Shreck* v. *Hanlon*, 66 Neb. 451, 453 (1902); *Sheldon* v. *Parker*, 66 Neb. 610, 628-631 (1902); *Fuller* v. *Rock*, 125 Ohio State 36 (1932); *Isaacs* v. *Neece*, 75 F. 2d 846, 850 (C.C.A. 5, 1935) with *Davis* v. *Willey*, 273 Fed. 397 (C.C.A. 9, 1921); *Silverman* v. *Christian*, 123 N. J. Eq. 506 (Ch. 1938).

> years after *adjudication* to bring suit. By fixing two years after adjudication, there can be no question but that the reopening of a case would not extend the time. Moreover, if the statute of a state provides a longer period, the provision as amended would not reduce the period.

With these objectives, the Congress in the Chandler Act enacted that the trustee:

> may two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim * * *.

Yet the court below by construction for which its suggests no authority, justification or necessity, misinterprets the section, perverts its purpose and once again introduces doubt and ambiguity, where certainty is so essential, by interpolating the italicized language to make it provide: The trustee—

> may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law *creating the cause of action* may permit, institute proceedings in behalf of the estate upon any claim * * *.

Thus, the trustee who, on the plain wording of the statute was fully justified in assuming that he had the full five-year period allowed by the Illinois statute within which to bring this suit, has been lulled into a false sense of security, only to find himself entrapped by the arbitrary construction adopted by the court below. Unless the decision is corrected, innocent creditors will in effect have been tricked by the statute and so deprived of the equality of distribution which is one of the primary objectives of the Bankruptcy Act.

3. **The decision of the court below, in ignoring the Rules of Decision statute, has decided a federal question in a way**

clearly in conflict with the applicable decisions of this Court.—The opinion of the court holds (R. 22):

> Since it is the Bankruptcy Act which creates the cause of action here, it *must* provide the period for bringing it, and in the absence of other provisions, the two-year one applies. * * *
>
> * * * *There is no applicable state statute for the reason that the cause of action was not created by the state.* * * * (Emphasis supplied).

These propositions are plainly erroneous. It is well recognized that causes of action are frequently created by federal law without specific prescription of periods of limitation for the enforcement thereof. It is also established that when a cause of action is created by federal statute without provision of any period of limitation, the result is to make operative the Rules of Decision Statute, 28 U. S. C. sec. 725, under which the state statute of limitations will necessarily control. *Campbell* v. *Haverhill*, 155 U. S. 610, 614-616; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *Rawlings* v. *Ray*, 312 U. S. 96; *Williamson* v. *Columbia Gas & Electric Corporation*, 110 F. 2d 15 (C. C. A. 3, 1940) cert. denied 310 U. S. 639.

Perusal of the opinion makes it clear that the decision is founded upon this misconception of elemental law in clear conflict with the decisions of this Court.

4. **The history and objectives of subsection 11e require that it be applied in accordance with its plain letter.**—The difficulties it was intended to obviate and its legislative history all show that subsection 11e was drawn having de[illegible]gard to the Rules of Decision statute and that it [illegible]nded primarily merely to toll the running of the statutes of limitation, federal or state, which, in the absence of specific limitation in the Bankruptcy Act, would apply to all suits brought by the trustee and in some instances might bar action by the trustee before he had had

opportunity to act or before the expiry of the two-year period contemplated as an essential minimum.

A. **The language of Section 11e is the result of careful and prolonged study by experts in the field.** Section 11e as added by the Chandler Act represents no hurried legislative action to meet problems only dimly perceived. In large part it represents the work of the National Bankruptcy Conference, an unofficial body organized in 1932 and made up of various groups interested in the perfecting of the Act, including the American Bar Association, the Commercial Law League, the American Bankers Association and many others. The drafting committee[4] of the Conference prepared and discussed seven successive drafts of a bill directed toward a general overhauling of the 1898 Act (Hearings, H. Committee on the Judiciary, H. R. 6439, amended, re-introduced and reported as H. R. 8046, June 1937, p. 2). For at least two years other numerous and eminent members of the legal profession, referees in bankruptcy, specialists in bankruptcy, judges and professors gave their best efforts to the drafting of this law. The House Judiciary Committee worked on the bill for a period in excess of four years (81 Cong. Rec., Pt. 8, pp. 8646-8647 (1937)).

B. **Section 11e was addressed to specific problems.** Subsection 11e is not an amendment of subsection 11d. On the contrary, it is an entirely new subsection. We recog-

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[4] The drafting committee included such men as:

Paul H. King, Chairman, member of the Advisory Committee on Commercial Law and Bankruptcy, American Bar Association, Chairman of the Committee on Uniformity of Practice, National Association of Referees in Bankruptcy, Detroit, Michigan.

Carl D. Friebolin, Chairman, Committee on Legislation, National Association of Referees in Bankruptcy, Cleveland.

James A. McLaughlin, Harvard Law School.

Jacob I. Weinstein, member, Bankruptcy Committee, Commercial Law League of America, Philadelphia, Pa. (16 Doc., A. G. Comm. on Bank. Admn. (2d Ser.) Doc. No. 10, p. vi).

nize, therefore, that little or no direct assistance in the interpretation of subsection 11e is to be obtained by reference to decisions construing subsection 11d of the 1898 Act or the provisions as to limitations contained in section 2 of the Bankruptcy Act of 1867. The decisions under section 11d of the 1898 Act are helpful, however, insofar as they point out the ambiguities and moot the questions which were sought to be remedied by passage of subsection 11e. The specialists who had to do with the drafting were thoroughly conversant with these decisions and, of course, addressed their efforts to the problems presented by them:

(1) On its face the statute was ambiguous because of its reference to "two years after an estate has been closed." See 6 J. N. A. Referees Bank. 61, 65; S. Hearings, Subcommittee of the Committee on the Judiciary, S. 3866, 77th Cong., 1st sess. (1932) pp. 932-935; 9 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 1.

(2) Question had arisen as to whether re-opening and again closing the estate extended the time. *Bilafsky* v. *Abraham*, 183 Mass. 401 (1903); *Kinder* v. *Scharff*, 231 U. S. 517 (1913).

(3) The decisions were in conflict as to whether the statute extended the period fixed by State law. 6 J. N. A. Referees Bank. 61, 65. See e.g. *Davis* v. *Willey*, 273 Fed. 397 (C. C. A. 9, 1921); *Isaacs* v. *Nevee*, 75 F. 2d 846, 850 (C. C. A. 5, 1935). It had been specifically held that because subsection 11d was in the form of a *prohibition* and purported only to limit the time within which a suit could be brought, it could not be construed to *extend* the period fixed by State law. *Charlesworth* v. *Hipsh*, 84 F. 2d, 834, 837 (C. C. A. 8, 1936).[5]

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[5] In construing subsection 11d before its amendment, this same distinction between *limitation* or *prohibition* as contrasted with *extension* was followed as late as 1941 in *Nairn* v. *McCarthy*, 120 F. 2d 910, 912 (C.C.A. 7). Judge Major in that case held:

"As we read the provision, however, it does not grant an extension of time, but is a prohibition against the institution of actions

(4) It had also been indicated that because the trustee's title did not vest until date of adjudication, the trustee could not sue on a cause of action barred as of that date. *In Re Dunavant*, 96 Fed. 542; *Harrod* v. *Farrar*, 68 Kan. 153, 157 (1903); *Gayland* v. *Arrowood*, 172 N. C. 591, 593 (1916).

C. **Section 11e, drafted and construed solely as a statute of extension, solved the problems presented.** No substantial change of subsection 11d, insofar as it operated as a statute of limitations barring suit against the trustee, was deemed desirable. Therefore, it was left in its prohibitory form with certain clarifying changes but modified expressly to omit reference to suits *by* the trustee.[6] But subsection e departs radically in form from the language used in subsection d as originally enacted and as amended. The subsection is entirely new.[7] Faced with the necessity of eliminating the questions of interpretation and opera-

either by or against the Trustee subsequent to the designated time. It does not follow from the fact that the Trustee is prohibited from bringing an action subsequent to that time that he is authorized to maintain an action prior thereto, irrespective of an applicable limitation statute. The provision is more for the protection of the Trustee than for his benefit and, in any event, is for the purpose of terminating his duties and responsibilities. As was said in *Charlesworth* v. *Hipsh, Inc.*, 8 Cir., 84 F. 2d 834, 837 in discussing this provision: "* * * Time in which the trustee may sue cannot be extended by provision in the Bankruptcy Act which purports only to limit the time within which a suit may be brought by or against him. * * *."

[6] Section 11d of the 1898 Act provided:

> "Suits shall not be brought by or against a Trustee of a bankrupt estate subsequent to two years after the estate has been closed."

As amended by the Chandler Act, Section 11d now provides:

> "Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed."

[7] Although the period of two years may have been adopted from the Bankruptcy Acts of 1841 and 1867, the permissive form of subsection 11e contrasts sharply with the definite prohibitions of those two statutes.

tion of subsection 11d of the 1898 Act outlined above, it was an obvious step for the draftsmen to revert to the laws of the several states as constituting the primary measure of limitation just as they would under the Rules of Decision statute, and to erect on that foundation the two-year provision as being the minimum time within which the trustee should be required to act. Under this new subsection it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the period of limitations fixed by State or Federal law either subsequent to the filing of the petition and prior to adjudication or prior to the lapse of two years after adjudication. By fixing two years after adjudication there can be no question but that the reopening of the case would not extend the time. There can be no invocation of the two-year period to bar claims or causes of action accruing subsequent to adjudication and otherwise suable because the two-year provision with its reference to "such further period as the Federal or State law may permit" purports not to impose a bar but rather merely to create a protective extension such as is often given under State law to administrators of estates of decedents.

D. **The legislative history shows that subsection 11e was throughout regarded not so much as a statute of limitations but primarily as tolling the running of the limitation otherwise applicable.** It is highly significant that in the development of subsection 11e it was treated by those concerned with its drafting as merely suspending the fall of the bar of the statute of limitations. Appended to one of the earlier drafts submitted by the National Bankruptcy Conference in May 1933 was a note which insofar as it related to subsection 11e stated (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 5, p. 23):

> Consider * * * "(e)" in connection with McAllester's proposal that during the pendency of the bankruptcy proceedings and for the prosecution of

claims and demands for and against the bankruptcy estate local statutes of limitations shall be suspended.

Appended to a redraft of Section 11 by the National Bankruptcy Conference submitted to the House Judiciary Committee on April 22, 1935, was the following note (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 8, p. 32):

The principle changes proposed in this section are:

A reduction in the period from two years to one within which suits may be brought against a person who has acted as the Trustee, with an extension of this limitation to receivers.

A new provision whereunder receivers and Trustees may bring action upon causes expiring by limitation under the law between the date of the filing of the petition and date of adjudication.

A new provision whereunder the operation of State statutes of limitation is suspended.

The second paragraph refers to subsection 11e and it is important to note therein the absence of any reference to a limiting effect in subsection 11e as contrasted with the direct reference in the first paragraph of the note respecting the limitation appearing in subsection 11d. The same note was appended to an analysis of H. R. 12889 (introduced by Congressman Chandler on May 28, 1936) prepared for the use of the House Judiciary Committee by the National Bankruptcy Conference (16 Doc., A. G. Comm. on Bank. (2d Ser.) Doc. No. 10, p. 35).

H. R. 6439 introduced on April 15, 1937 embodied subsection 11e substantially as it appeared in the earlier bill. On July 28, 1937 Mr. Chandler introduced H. R. 8046 as a substitute for H. R. 6439 in which subsections 11d and 11e were unchanged except that for the first time there appeared in subsection 11e the second sentence with which we are not here directly concerned. It is pertinent to note, however, that in urging the adoption of the second sentence of subsection 11e, at least insofar as it related to the pro-

visions of agreements, Mr. Teitlebaum, representing the members of the Bankruptcy Committee of the Association of the Bar of the State of New York, treated the first sentence of subsection 11e, not as creating, but rather as tolling the limitation period. After reading the first sentence of subsection 11e in the bill he said: (Hearings, H. Committee on the Judiciary, H. R. 6439 amended, re-introduced and reported as H. R. 8046, 75th Cong. 1st sess. (1937) p. 33-35):

> In other words, it tolls the statute of limitations against a receiver or Trustee and gives him a further opportunity to bring any action which the estate may have, which otherwise he may be debarred from bringing by reason of the operation of a Federal or State statute of limitations.
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> It tolls the statute for that period of time, in order to give an opportunity to the successors in interest, the receiver or Trustee, to take appropriate action.

The House report accompanying the bill was equally innocent of any reference to subsection 11e as establishing any period of limitations. It stated (H. Rept. No. 1409, 75th Cong. 1st sess. (1937) p. 20):

> A new provision in subdivision e permits receivers and trustees within two years after the adjudication to institute suits on claims against which the period of limitation fixed by Federal or State law had not expired at the time of the bankruptcy or within such further time as the Federal or State law may permit.

Bearing in mind that it was the purpose of subsection 11e to clarify ambiguities and resolve conflicts which had developed in the application of subsection 11d of the Bankruptcy Act, it seems clear that if Congress had intended that section 11e should provide a time within which trustees may sue causes of action created by the Bankruptcy Act different from the period applicable to those created

by statute or existing at common law, then it would have found words which clearly so provided and would have added to section 11e at the end of the first sentence, after the word "bankruptcy", some such language as the following:

> "provided that as to actions which did not exist prior to bankruptcy, but are created by this Act only, the trustee or receiver shall have only two years to institute proceedings after the date of adjudication.

It thus appears that the House committee which most intimately knew all phases of the Chandler Act regarded subsection 11e primarily as merely providing a minimum period—two years from adjudication—within which the trustee or receiver may institute proceedings.[8] Neither the language of the section nor any discovered intent or policy afford foundation for construing the subsection as cutting down the period of limitation fixed by other Federal or state law and which, under familiar principles and the Rule of Decisions statute, would control any action by the trustee were the Bankruptcy Act entirely silent on the matter. However, for clarity section 11e specifically affirms that the trustee is authorized to proceed "upon any claim" within "such further period of time as the Federal or State law may permit".

In conformity with the legislative history of the subsection, and giving proper scope to its plain language, the effect of subsection 11e is stated as follows in 1 Collier on Bankruptcy (14th ed.) sec. 11.13, pp. 1186-1188:

> Subdivision e operates as a statute of limitations on suits brought in behalf of the estate by the receiver or trustee. The language of the subdivision clearly indicates that it has reference to suits initiated sub-

[8] An obviously inaccurate and incomplete reference to subsection 11e in the Senate report does refer to it as fixing a period of limitations (S. Rept. No. 1916, 75th Cong. 3rd sess. (1938) p. 3).

sequent to the time of bankruptcy. If the federal or state period of limitation applicable to a claim has not run prior to the filing of the petition in bankruptcy, §11(e), which is in the nature of a special statute of limitations, is applicable and supersedes the state or federal statute of limitations to the extent that the trustee or receiver has at least two years from the date of adjudication in which to commence suit. Under former subdivision d, this point was subject to some confusion. * * * *In the event that the applicable state or federal statute is longer in duration than the two-year period specified in subdivision e, the subdivision provides that the receiver or trustee may sue "within such further period of time as the federal or state law may permit."* * *

It should be noted, however, that subdivision e has altered the span of time within which the receiver or trustee may bring suit as compared to former subdivision d. It is now provided that the time allowed is 'within two years subsequent to the *date of adjudication*", or such further period of time as the federal or state statute of limitations may permit. Former subdivision d allowed suit within two years after the estate was closed. Such a limitation was extremely indefinite and had no real connection with a suit which a receiver or trustee might institute on behalf of the estate.

The character of the suit or proceeding brought is immaterial, so long as it is "in behalf of the estate." (Emphasis supplied.)

In its fullness subsection 11e may properly be deemed to meet all the problems of interpretation that arose under the old law and to state the controlling law as to proceedings on behalf of the estate by the receiver or trustee on any claim which existed in favor of the bankrupt or a creditor, on any claim or cause of action created by the Bankruptcy Act and on any claim or cause of action accruing subsequent to adjudication. But to cover all, the subsection must be applied according to its terms and without

reading into it exceptions or limiting provisos foreign to its letter and plain intent.

5. **The question is important in the administration of the Bankruptcy Act and should be settled by this Court.** It is plain that the effect and operation of section 11e should be authoritatively determined, not only in the interest of uniformity, but to avoid the misleading of trustees and of creditors who may otherwise be deprived of the equality of distribution sought to be accomplished by section 60a. The importance of questions affecting the administration of the Bankruptcy Law has long been recognized by this Court. *Daniel* v. *Guaranty Trust Company of New York*, 285 U. S. 154; *American Surety Company of New York* v. *Marotta*, 287 U. S. 513; *Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472.

The opinion in this case is notable for the utter lack of authority or reasoning to support the conclusion as well as for the frank admission "In fact we have found no case strictly in point (R. 23)."

The question is one which will frequently recur. The question here involved is not confined to bankruptcy estates in Illinois alone. On the contrary, a large number of the states have statutes comparable to the Illinois law establishing a period of more than two years within which causes of action not otherwise provided for by state law may be brought.[9]

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[9] Of the first 16 states, statutes of which were examined, ten have catch all statutes similar to that of Illinois which would plainly embrace actions to recover preferences such as that here involved. Cf. 2 Arizona Code Ann. (1939) § 29-206, 2 Arkansas Dig. Stats. (Pope, 1937) § 8938; California, Civ. Proc. Code (Deering, 1937) § 343; 7 Florida Stats. Ann. (1941) § 95.11(4); Idaho Ann. Code (1932) § 5-224; Indiana Stats. (Baldwin, 1934) § 62; Iowa Code (1939) § 11007(5); Kansas G. S. (1935) § 60-306; Kentucky Rev. Stats. (1942) § 413.160; Maine Rev. Stats. (1930) c. 95, § 97.

In view of the plain language of section 11e, the unreasoned nature of the decision below and the onerous burden which it places on trustees and creditors, it is submitted that the question is one requiring the exercise of the jurisdiction of this Court.

CONCLUSION.

For these reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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